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DOCKET FILE COPY ORIGINAL

December 12, 1997

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: **Comments of Motorola, Inc., CC Docket No. 97-213**

Dear Ms. Salas:

Enclosed for filing are an original and nine copies of Motorola's comments in the above-captioned matter. Also enclosed is an additional copy which we ask that you please date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Thomas M. Barba
Counsel for Motorola, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: **Communications Assistance for Law Enforcement Act**	**CC Docket No. 97-213**

COMMENTS OF MOTOROLA, INC.

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December 12, 1997

SUMMARY

In response to the Commission's Notice of Proposed Rulemaking, Motorola offers several suggestions that it believes will allow the Commission to implement the Communications Assistance for Law Enforcement Act of 1994 ("CALEA") in a consistent and predictable manner.

First, the Commission should avoid an overly-expansive definition of "telecommunications carrier." Instead, the Commission should limit the scope of CALEA to those service providers specifically enumerated by Congress in the legislative history. The Commission also should exercise its authority, pursuant to section 102(8)(C)(ii), to exempt carriers from coverage under CALEA. Specifically, the Commission should conclude that neither resellers nor special mobile radio services (except those that "utilize intelligent switching capability and offer seamless handoff of customers") are "telecommunications carriers."

Second, the Commission should clarify that a manufacturer that develops equipment consistent with an interim standard or a standard that is under challenge (pursuant to section 107(b) of CALEA) is in compliance with CALEA during the period that the interim or challenged standard is in force. Moreover, the Commission should rule that, in the event the interim or challenged standard is replaced, the manufacturer will be given at least two-years to comply with the new standard.

Third, in considering "reasonably achievable" petitions, the Commission should give particular weight to those statutory factors that consider the technical and financial realities experienced by industry. The Commission also should clarify that

telecommunications equipment manufacturers may file "reasonably achievable" petitions and otherwise participate in such proceedings.

<u>Fourth</u>, the Commission should grant a blanket extension of the CALEA capability compliance date to October 24, 2000 for all telecommunications carriers and manufacturers.

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COMMENTS OF MOTOROLA, INC.

Motorola, Inc. ("Motorola") respectfully submits these comments pursuant to 47 C.F.R. §§ 1.415, 1.419 and the Notice of Proposed Rulemaking ("Notice") in this proceeding.[1] In its Notice, the Commission has requested comments on several responsibilities assigned to the Commission under the Communications Assistance for Law Enforcement Act of 1994 ("CALEA"). Motorola hereby comments on four of these issues.

I. DEFINITION OF "TELECOMMUNICATIONS CARRIER"

Motorola manufactures equipment for various telecommunications service providers, many of which Congress did not intend to be covered by CALEA. So that equipment manufacturers can focus on their obligations under CALEA and not waste

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[1] See Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, FCC 97-356 (Oct. 10, 1997) ("Notice").

resources deliberating as to whether certain technologies are covered by CALEA and whether new industry standards are necessary, the Commission's regulations should, to the maximum extent feasible, provide guidance to industry so that non-covered technologies can be readily identified.

The legislative history suggests that Congress did not intend for the definition of "telecommunications carrier" to be interpreted expansively. In response to the concerns of privacy advocates, Congress recognized that "the scope of the legislation has been greatly narrowed . . . [t]he only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders."[2]

Specifically, Congress identified a list of entities which it considered to fall within this definition.[3] Motorola suggests that the Commission limit the scope of CALEA to those entities specifically enumerated in the legislative history (and echoed by the Commission in its Notice).[4] Such a definition would be consistent with Congress'

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[2] H.R. Rep. No. 103-827, at 18 (1994) ("House Report").

[3] See House Report at 20 ("This definition encompasses such service providers as local exchange carriers, interexchange carriers, competitive access providers (CAPs), cellular carriers, providers of personal communications services (PCS), satellite-based service providers, cable operators and electric or other utilities that provide telecommunications services for hire to the public, and any other common carrier that offers wireline or wireless service for hire to the public.").

[4] Id.; NPRM ¶ 17 (requesting comment on whether definition of "telecommunications carrier" should be expanded beyond list substantially the same as that contained in the House Report).

stated intent and would provide manufacturers with certainty as to which technologies are covered by CALEA.

The Commission does not need to supplant the simple statutory definition of telecommunications carrier -- one "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[5] The Commission's proposal to include "any entity that holds itself out to serve the public indiscriminately in the provision of any telecommunications service"[6] provides little additional focus and, unless defined with greater precision, could impart an overly-broad scope that could produce the kind of uncertainty that Congress wished to avoid.

Consistent with the above, Motorola fully supports the Commission's tentative conclusion that private mobile radio service ("PMRS") providers are not common carriers subject to CALEA. As the Commission properly notes, private SMR providers regulated under Part 90 of the Commission's rules are not telecommunications carriers under CALEA because, "pursuant to Section 332 of the Communications Act, persons engaged in private mobile service cannot be treated as . . . common carriers for any purpose under the Communications Act."[7]

Similarly, Motorola supports the Commission's conclusion that "providers of exclusively information services, such as electronic mail providers and on-line service providers, are excluded from CALEA's requirements and are therefore not required to

[5] CALEA § 102(8)(A), 47 U.S.C. § 1001(8)(A).

[6] Notice ¶ 16.

[7] Notice ¶ 19.

modify or design their systems to comply with CALEA."[8] Congress clearly intended for this "information services" exemption to be read broadly to cover electronic, data communication services and the Commission should so confirm.[9] Below, Motorola identifies two additional categories of service providers which it believes do not fall within the scope of CALEA.

Finally, as the Commission notes, Congress also granted the Commission the discretion, after consultation with the Attorney General, to exempt classes or categories of service providers that would otherwise qualify as "telecommunications carriers" under CALEA.[10] This is an important statutory authority that should be exercised. In particular, the Commission should use this authority to exempt service providers whose facilities are not needed to carry out an interception.[11] In order to facilitate this authority, Motorola requests that the Commission establish a procedure by which carriers and manufacturers can petition to exempt particular technologies from coverage.[12]

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[8] Notice ¶ 20.

[9] See, e.g., House Report at 18 & 21.

[10] CALEA § 102(8)(C)(ii), 47 U.S.C. § 1001(8)(C)(ii).

[11] For example, to the extent service providers market unswitched local loops, such infrastructure cannot practically be used for call intercepts – which will typically be conducted at a switch or on the carrier side of the switch. See, e.g., Telecommunications Industry Association/Alliance for Telecommunications Industry Solution J-STD-025 (Lawfully Authorized Electronic Surveillance) (1997).

[12] CALEA § 102(8)(C)(ii), 47 U.S.C. § 1001(8)(C)(ii); CALEA § 301, 47 U.S.C. § 229.

A. RESELLERS

In its Notice, the Commission seeks comments on whether "resellers" should be covered by CALEA.[13] Resellers do not qualify as telecommunications carriers under CALEA.

CALEA defines a "telecommunications carrier" as "engaged in the transmission or switching of wire or electronic communications."[14] This language indicates that resellers cannot be "telecommunications carriers," because facilities-based operators (and not resellers) engage in transmission and switching of communications. Moreover, it would be impossible for a reseller to fulfill the technical capability requirements of CALEA where the underlying facilities that it resells do not fulfill those requirements. Accordingly, the obligations of CALEA should be placed only on the facilities-based operator.

Exclusion of resellers from the definition of "telecommunications carrier" would not impair the ability of law enforcement to intercept and identify communications. First, resellers that own certain facilities (e.g., a switch) would be subject to CALEA with respect to those facilities. Second, resellers are subject to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[15] which require any "provider of wire or electronic communication service" to cooperate with court-ordered interception of communications.[16]

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[13] Notice ¶ 17.

[14] CALEA § 102(8)(A), 47 U.S.C. § 1001(8)(A).

[15] Pub. L. No. 90-351, 82 Stat. 197 (1968).

[16] 18 U.S.C. § 2518(4).

B. SPECIAL MOBILE RADIO SERVICES

The Commission should identify as "telecommunications carriers" under CALEA only those providers of Specialized Mobile Radio service (SMRs) who also qualify as "covered SMRs" for purposes of the Commission's E-911 requirements.

In general, it is apparent from the language of CALEA that SMR providers are "telecommunications carriers" only to the extent that they provide commercial services that are interconnected to the public switched telephone network ("PSTN"). The statutory definition of "telecommunications carrier" includes entities "engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 . . .)."[17] Section 332(d) of the Communications Act defines "commercial mobile service" as those mobile services that provide "interconnected service" with the public switched network and are provided to the public for profit.[18]

However, consideration of whether an SMR provides commercial, interconnected service (and, hence, qualifies as a CMRS) alone is insufficient. As the Commission has recognized, the broad spectrum of services that may qualify for classification as CMRS should not necessarily be subject to the same regulatory obligations.[19]

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[17] CALEA § 102(8)(B)(i), 47 U.S.C. § 1001(8)(B)(i).

[18] 47 U.S.C. § 332(d)(1) & (2); see also 47 C.F.R. § 20.9(a)(4).

[19] See, e.g., Implementation of Section 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, ¶ 162 (1994) ("differential regulatory treatment of different classes of CMRS providers may become warranted because of rapidly changing circumstances in the CMRS marketplace."); Implementation of Section 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988, ¶ 79 (1994)("we do not believe that all substantially similar services must have identical

(Continued ...)

Some traditional analog SMR operators may have a limited ability to offer interconnected, two-way switched voice service.[20] However, these traditional SMRs do not have the technical ability to comply with CALEA's capability requirements (and are not components of the public switched network where law enforcement agencies have traditionally served most of their surveillance orders).[21] For similar practical considerations, the Commission recently exempted such traditional analog SMRs from 911 and enhanced 911 requirements, defining "covered SMRs" (for purposes of those requirements) as SMR providers who "utilize intelligent switching capability and offer seamless handoff of customers."[22] Motorola would urge the Commission to adopt a similar definition for purposes of CALEA's capability requirements.

II. Technical Standards Safe Harbor

A critical provision of CALEA for providing predictability to equipment manufacturers is the technical standards safe harbor of § 107(a)(2):

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technical and operational rules, especially if the imposition of such identical rules would require carriers to reconfigure their services in ways that could adversely affect their ability to compete.").

[20] A traditional analog SMR typically consists of a single radio tower and does not have intelligent switching capability, channel re-use or call hand-off.

[21] Moreover, such analog SMR communications can be intercepted through traditional, well-established methods -- such as using a cloned handset or tapping a call at the local exchange carrier's switch.

[22] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Order, CC Docket No. 94-102, ¶ 6 (Dec. 1, 1997).

> [A] manufacturer of telecommunications transmission or switching equipment . . . shall be found to be in compliance with section 106, if the . . . manufacturer . . . is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission . . . .[23]

The Commission stated in its Notice that "[b]ased on the ongoing nature of the standard-setting process, we conclude that it would be inappropriate at this time for us to address technical capability standards issues."[24]

Nevertheless, the Commission must recognize that in addition to standards-setting issues, it must address the effect and interpretation of technical standards. This proceeding provides an appropriate opportunity for the Commission to do so. For example, where an equipment manufacturer designs equipment that complies with (1) an industry standard (including interim/trial use standards), (2) an industry standard that is later found deficient under § 107(b) of CALEA, or (3) an industry standard that is under challenge pursuant to § 107(b), the Commission should provide that the manufacturer is not subject to liability under CALEA:

- during the period that the interim standard or standard subject to challenge remains in force; and
- for two years after the interim standard or standard subject to challenge is replaced by a new standard.

The adoption of such a transition period is explicitly required under § 107(b) of CALEA, which directs the Commission to "provide a reasonable time and conditions for

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[23] CALEA § 107(a)(2), 47 U.S.C. § 1006(a)(2).

[24] Notice ¶ 44.

compliance with and the transition to any new standard."[25] Moreover, a transition period is commercially essential to equipment manufacturers that face 2-3 year product upgrade cycle constraints. In order to provide predictability to equipment manufacturers in dealing with these constraints, the Commission should adopt the clear definition of the transition period proposed in these comments.[26]

III. "Reasonably Achievable"

Section 109(b) of CALEA permits "a telecommunications carrier or any other interested person" to petition the Commission to determine that compliance with CALEA is "not reasonably achievable with respect to any equipment, facility or service installed or deployed after January 1, 1995."[27] The Commission should explicitly provide that a telecommunications equipment manufacturer is an "interested party" that is entitled to file such a petition.[28] There should be no doubt that equipment manufacturers are "interested parties," both because the statutory factors discussed below plainly apply to manufacturers and because manufacturers, as the designers and

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[25] CALEA § 107(b)(5), 47 U.S.C. § 1006(b)(5).

[26] This proposal for a two-year transition period upon changes to a standard is quite modest in comparison to the initial four-year transition period (with possibility of extensions) Congress provided for initial compliance with CALEA. See CALEA §§ 111(b) & 107(c), 47 U.S.C. §§ 1001 (note) & 1006(c).

[27] CALEA, § 109(b), 47 U.S.C. § 1008(b).

[28] See CALEA § 109(b)(1), 47 U.S.C. § 1008(b)(1) (providing for determinations regarding "reasonable achievability" "on petition from a telecommunications carrier or any other interested person").

builders of telecommunications equipment, are inherently central to the determination whether particular technical capability requirements are "reasonably achievable."

The Commission also has sought comment on the eleven statutory factors it is to consider in deciding "reasonably achievable" petitions.[29] The statutory language and legislative history clearly indicate that Congress did not intend CALEA's obligations to be absolute, but to be tempered by what was technically and financially feasible.[30] Consistent with this intent, the Commission should assign the greatest weight to those factors that consider the technical and financial realities experienced by industry. Specifically, in Motorola's view, the greatest emphasis should be placed on:

- "[t]he effect on the nature and cost of the equipment, facility, or service at issue"[31];
- "[t]he effect on the operation of the equipment facility, or service at issue"[32]; and
- [t]he need to achieve the capability assistance requirements . . . by cost-effective methods."[33]

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[29] See Notice ¶ 48 (requesting comment regarding specific "reasonably achievable" factors).

[30] See, e.g., House Report at 19 ("The Committee's intent is that compliance with the requirements in the bill will not impede the development and deployment of new technologies. . . . The bill establishes a reasonableness standard for compliance of carriers and manufacturers. . . . One factor to be considered when determining whether compliance in reasonable is the cost to the carrier of compliance compared to the carrier's overall cost of developing of acquiring and deploying the features or services in question."). See also CALEA, §§ 107(c)(2), 108(a)(2) & 109(b)(1), 47 U.S.C. §§ 106(c)(2), 107(a)(2) & 108(b)(1).

[31] CALEA § 109(b)(1)(E), 47 U.S.C. § 1008(b)(1)(E).

[32] CALEA § 109(b)(1)(F), 47 U.S.C. § 1008(b)(1)(F).

[33] CALEA § 109(b)(1)(D), 47 U.S.C. § 1008(b)(1)(D).

IV. EXTENSION OF COMPLIANCE DATE

As the Commission notes, section 107(c) of CALEA permits the Commission to grant petitions to extend the CALEA compliance deadline for existing telecommunications carriers from October 25, 1998 to October 24, 2000.[34] Many carriers are planning to file such petitions. The Commission should expect to receive hundreds (if not thousands) of individual petitions, each representing disparate factual issues, but making the same basic legal arguments.

Rather than considering these petitions on an ad hoc basis, the Commission should consider methods of granting a blanket two-year extension to all telecommunications carriers and manufacturers.

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[34] CALEA § 107(c), 47 U.S.C. § 1006(c); Notice ¶ 49.

V. CONCLUSION

Motorola generally supports the Commission's proposals to implement CALEA. However, Motorola asks that the Commission adopt the recommendations suggested herein to permit Motorola and other telecommunications manufacturers to implement this statute in a consistent, predictable and reasonable manner.

December 12, 1997

Respectfully submitted,

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